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Federal Communications Commission
Office of Secretary

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July 10, 1996

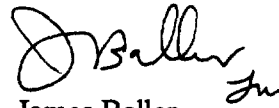
Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communication in CC Dockets No. 96-98 and 96-45

Dear Secretary Caton:

Enclosed for filing are two copies of an *ex parte* communication that I caused to be delivered today by hand to each addressee and designated recipient of a copy.

Sincerely,


James Baller

Enclosures

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The Honorable Reed Hundt, Chairman
The Honorable James Quello, Commissioner
The Honorable Rachele Chong, Commissioner
The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Eighth Floor
Washington, D.C. 20554

Regina M. Keeney, Bureau Chief
Dr. Kathleen Levitz, Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
2033 M Street, N.W.
Suite 500
Washington, D.C. 20554

Re: Dockets No. 96-98 (Local Competition) and 96-45 (Universal Service)

Dear Mr. Chairman, Commissioners, Ms. Keeney and Dr. Levitz:

The American Public Power Association ("APPA"), the national service organization for the Nation's approximately 2000 publicly-owned electric utilities, has recently participated in a series of *ex parte* meetings with senior members of the Commission's staff. At one of these meetings, James Coltharp, Senior Advisor to Commissioner Quello, suggested that APPA write a letter to each of you outlining the main barriers that the Commission must overcome in order to encourage publicly-owned utilities to make as important a contribution in bringing competition and universal service to telecommunications as they have made for the last century in the field of electric power.

APPA submits that the Telecommunications Act of 1996 has gone a long way toward removing the most significant of these barriers and that the Commission need take only a few small but critical additional steps to overcome the remainder. These steps are well within the Commission's authority and discretion.

Summary of APPA's Written Comments and *Ex Parte* Presentations

Written Comments

In its written comments on local competition, APPA reviewed the essential role that publicly-owned utilities have played since the 1880's in making electric service universally available in many communities that would literally have been "left in the dark" by profit-seeking privately-owned electric utilities. APPA also discussed the benefits that publicly-owned power systems have brought in many other communities across the Nation by competing head-to-head with privately-owned utilities -- low prices, high quality, innovation and universal service.

Publicly-owned electric utilities have never been driven by profits, but by an ethic of public service tailored to local conditions, local needs and local expectations. In the electric industry, they have long established "benchmarks" of how much electric power should cost and what good service means. In the absence of significant barriers to entry, they can now play a similar role in telecommunications.

In the years ahead, telecommunications applications will become increasingly significant to electric utilities on both the supply side and the demand side of their operations. On the supply side, telecommunications-based applications will include systems for network control, data collection and data management, power brokerage, power plant emissions trading, outage handling, service restoration, automatic meter reading, remote service connection and disconnection, and many other services. On the demand side, applications will include systems for real-time pricing, direct load management, demand-side management, power quality monitoring, detailed billing (appliance-by-appliance, machine-by-machine, minute-by-minute), energy usage analysis, and improved response to customer needs (e.g., electronic answering of questions, rapidly identifying and solving problems, etc.). As telecommunications become increasingly important in the delivery of electric power, lines between telecommunications activities and electric power services are likely to blur.

Turning to the new Telecommunications Act, APPA noted that Congress defined the key term "telecommunications service" in Section 3(51) to exclude many of the telecommunications activities in which publicly-owned utilities may initially engage, including furnishing support to other government entities, entering into contracts for private carriage, and leasing "dark fiber" or other telecommunications infrastructure or facilities to persons who are themselves providers of covered "telecommunications services." APPA urged the Commission to interpret these provisions as written. APPA also noted that Congress afforded the Commission broad authority in Section 401 to forbear from enforcing the Act or the Commission's implementing regulations against any telecommunications carrier or class of carriers. APPA therefore encouraged the Commission to promote competition by publicly-owned electric utilities to the maximum extent possible by using its authority under Section 401, if necessary, to forbear from regulating such entities.

APPA also observed that the provisions in Section 253 of the Act governing preemption of state and local barriers to entry are broad enough to cover both explicit and implicit requirements that "may" prohibit or "have the effect" of prohibiting publicly-owned electric utilities from participating either as competitors themselves or as facilitators of the provision of telecommunications services by others. In addition, APPA emphasized the significance of Section 702's reaffirmance and extension

of the exemption that publicly-owned utilities have always had from federal regulation of their poles, attachments, ducts, conduits and rights of way.

In its written comments on universal service, APPA again noted the ethic of universal service that has guided the activities of publicly-owned utilities for the last century. APPA urged the Commission to do nothing that would preclude or inhibit publicly-owned utilities from participating on an equal basis with other participants in the forthcoming program for universal telecommunications service.

Ex Parte Meetings

On June 27-28, 1996, representatives of APPA met with senior advisors to Commissioners Quello, Chong and Ness, with Dr. Levitz and several of her colleagues in the Common Carrier Bureau, and with John Reel and a team of officials involved in drafting the universal service regulations. APPA's delegation included representatives of three progressive publicly-owned electric utilities involved in a range of telecommunications activities -- the electric utilities serving Glasgow, Kentucky, Los Angeles, California and Manassas, Virginia. In these meetings, APPA stressed four main themes:

1. Publicly-Owned Electric Utilities Can Play a Major Role in Bringing Competition to the Telecommunications Industry.

Over the next few years, hundreds of publicly-owned electric utilities will need to upgrade their telecommunications infrastructure to support their core business of providing electric service at ever increasing levels of efficiency and reliability. The sophisticated telecommunications infrastructure that these utilities will need for their own purposes can support the provision of video, voice, data and other interactive telecommunications services by the electric utilities themselves or by other providers of such services.

By encouraging publicly-owned electric utilities to make their facilities available for these purposes, the Commission can simultaneously accelerate the pace of deployment of our National Information Infrastructure, promote competition, ensure universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way. The Commission can also help preserve essential competition among publicly-owned and privately-owned providers of electric service.

2. The Commission Should Act Forcefully to Overcome Barriers to Entry Currently Facing Publicly-Owned Electric Utilities.

Although publicly-owned electric utilities have vast potential as providers or facilitators of telecommunications service, they face some important obstacles that the Commission must help them to overcome if this potential is to be realized.

At the outset, APPA stresses that every step that publicly-owned electric utilities take is subject to intense public scrutiny and local control, which has historically served as a forceful and effective alternative to federal and state regulation. Local control over major policy decisions is

particularly important to communities that support publicly-owned electric utilities because they bear the entire financial risk of failure.

In these circumstances, regulation by a distant authority, or even the perception that the nature and scope of such regulation is uncertain and could result in loss of local control, would surely cause many local governments to deny or delay approval of their electric utility's involvement in telecommunications activities. Any such fears, moreover, would surely be reinforced by well-financed incumbent and potential telecommunications service providers.

The considerations outlined above do not just apply to small rural towns. If anything, as Paul Shockley, speaking for the Los Angeles's electric utility, emphasized throughout our *ex parte* meetings, they are all the more significant in larger cities.

In short, APPA applauds the Commission's commitment to establishing "competitively neutral" regulations, but it submits that the concept of "neutrality" has special meaning for publicly-owned electric utilities. For them, "regulation" has historically meant local control, and this has served the Nation very well for more than 100 years. Subjecting publicly-owned electric utilities to a wholly new regulatory environment would not be "neutral" from their standpoint but would put them at a significant disadvantage that could severely impair or limit their involvement in telecommunications.

3. The Commission Should Articulate a Clear and Consistent Policy of Broad Construction and Aggressive Enforcement of Its Authority to Preempt State and Local Barriers to Entry.

APPA has two main concerns about the preemption provisions of the Act. First, under Section 253(d) of the Act, the Commission must determine preemption issues on a case-by-case basis, following notice and opportunity for public comment. APPA believes that case-by-case determinations are preferable to any attempt by the Commission to anticipate and deal in the abstract with the complex and multi-faceted issues that requests for preemption may pose. APPA is concerned, however, that such proceedings could be time-consuming, expensive and uncertain for all concerned. The best solution, APPA submits, is for the Commission to decide these cases expeditiously and to send a clear and unmistakable message in each one that the Commission intends to enforce its preemption authority aggressively to eliminate state and local barriers to entry.

Second, numerous publicly-owned electric utilities operate in states that adhere to the so-called Dillon Rule -- a statutory principle under which a utility is deemed *not* to have authority to engage in a particular activity *unless* the utility's enabling statute or charter expressly or necessarily gives the utility that authority. In Dillon Rule states, this requirement can pose an insurmountable barrier to entry, as it is virtually impossible for a publicly-owned electric utility to get express legislative authorization to enter into telecommunications in the face of politically influential opposition from incumbent and potential telecommunications service providers. APPA believes that the preemption provisions of the Act apply to *all* state and local requirements that "have the effect" of barriers to entry, including the Dillon Rule, and that the Commission should make this clear to interested persons across the Nation as soon as a proper case comes before it. APPA would also welcome a statement by the Commission to that effect in its order adopting its local competition rules.

4. The Rationale Underlying the Universal Service Program Does Not Apply to Publicly-owned Electric Utilities.

The rationale underlying the universal service program is that all providers of telecommunications service will profit significantly from doing so and should contribute a portion of these profits to offset the above-average costs of carriers designated to make telecommunications services available to persons in high cost areas who would not otherwise receive them. This rationale does not apply to most publicly-owned electric utilities and could lead to anomalous results.

Publicly-owned electric utilities typically make electric service universally available in their service area, and they do not earn "profits" as such. Rather, they price their services on a cost-of-service basis and include the cost of providing universal service in their cost base. Thus, the paying customers of publicly-owned utilities already bear the costs of universal service in their own communities. Requiring them to pay higher rates to support universal service elsewhere would be unfair and inappropriate, particularly if the ultimate effect of doing so would be to enhance the ability of privately-owned electric utilities to compete with publicly-owned electric utilities. The same considerations would also apply to publicly-owned electric utilities that choose to extend their services to telecommunications.

APPA's Specific Recommendations

As indicated, fear of regulation and loss of local control are powerful barriers to entry affecting publicly-owned electric utilities of all sizes and in all regions. Removal of these obstacles can help to facilitate widespread participation by such entities in developing the National Information Infrastructure. APPA submits that the Commission can achieve this result most simply and effectively by interpreting the Act to exclude publicly-owned electric utilities from the definitions of the terms "telecommunications carrier" in Section 3(49) and "local exchange carrier" in Section 3(44) of the Act.

Specifically, APPA recommends that the Commission construe these terms as including limitations similar to those that Section 702 of the Act and Section 224(a)(3) of the Communications Act of 1934 apply to the term "utility" in the context of pole attachments -- i.e., they exclude "any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." The term "State," in turn, is defined in that Section 224(a)(3) as "any State, territory, or possession of the United States, the District of Columbia, *or any* political subdivision, agency or instrumentality thereof."

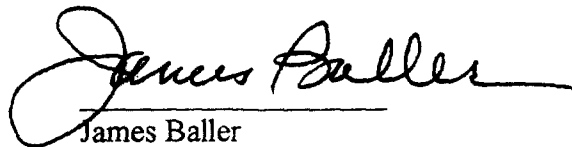
Given the broad authority that Congress has afforded the Commission in construing the Telecommunications Act so as to promote competition, APPA believes that the Commission can interpret the Act itself as being hospitable to the limitations that APPA proposes. At a minimum, Section 401 of the Act gives the Commission wide discretion to forbear from regulating publicly-owned electric utilities as a "class" if it finds that such regulation is unnecessary and inconsistent with the public interest and that forbearance will promote competition. APPA submits that its submissions in these dockets would amply support such findings.

If the Commission believes that forbearance is the preferable vehicle, it should treat this letter as a petition for forbearance. Section 401 does not specify procedures for ruling on such petitions, except to say that a petition will be deemed granted if not denied within a year (unless the period is extended by the Commission). APPA submits that, given the rapid pace of change in the telecommunications field and the narrow window of opportunity for public-owned electric utilities to establish a presence, the Commission should act affirmatively as soon as possible, preferably in the course of issuing the order adopting its regulations on local competition.

With respect to the Universal Service program, APPA submits that the Commission should give publicly-owned electric utilities the choice of participating on equal terms with all other participants in the program or of "opting out" of the program -- i.e., electing neither to receive funds from nor make contributions into the program. Again, APPA believes that the Commission can achieve this result either as a matter of statutory construction or forbearance.

Finally, APPA recommends that the Commission announce in its order adopting its local competition rules that it regards the Dillon Rule as a barrier to entry that the Commission can and will preempt in an appropriate case brought before the Commission pursuant to Section 253 of the Act.

Respectfully submitted,



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